BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIANN L. COLBERT	)	
Claimant	)	
	)	
VS.	)	
	)	
U.S.D. 475	)	
Respondent	)	Docket No. 1,035,780
	)	
AND	)	
	)	
KANSAS ASSOC. OF SCHOOL BOARDS	)	
WORKERS COMPENSATION FUND	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the November 8, 2007 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) concluded that claimant's evidence established that she sustained an accidental injury arising out of and in the course of her employment with respondent on December 11, 2006. He further found that respondent had actual knowledge of her injury and failed to file an accident report as required by K.S.A. 44-557(a). And while claimant failed to serve a written claim upon respondent within 200 days of the accident, the filing of her claim within a year of her accident satisfied the written claim statute. Thus, he awarded temporary total disability benefits (TTD) and medical treatment with Dr. Peloquin.

The respondent requests review of the preliminary hearing Order taking issue with the jurisdictional findings made by the ALJ. Respondent first argues that claimant failed to prove that she sustained an accident arising out of and in the course of her employment, pointing to claimant's own representations to her supervisor and also her disability insurer that her neck complaints developed before December 11, 2006 and were not work-related. Respondent next argues that claimant failed to give notice as required by K.S.A. 44-520.

Lastly, respondent contends that claimant is not entitled to TTD benefits as she is working elsewhere and is therefore, not incapable of engaging in any type of substantial and gainful employment.[1] Respondent's brief to the Board asserts yet another argument in its defense. Respondent maintains that claimant's activities on the date of her accident constitute an activity of daily living and under the *Johnson*[2] rationale, are not compensable under the Kansas Workers Compensation Act. Accordingly, respondent urges the Board to reverse the ALJ's Order, denying claimant's request for compensation.

Claimant argues that the Order should be affirmed in all respects, adding that the Board has no jurisdiction over the ALJ's decision to award TTD benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ succinctly summarized the pertinent facts as follows:

> The claimant's supervisor testified that when the claimant came in to work she was already "stiff" and her shoulders were askew. However, as the claimant performed her duties that day her condition worsened, to the point that the claimant was crying and her supervisor was urging her to go to a doctor. The claimant nonetheless attempted to perform her duties as assigned, but her supervisor noted she was unable to accomplish this, including that the claimant had difficulty shelving books.
>
> The evidence presented shows that the respondent had actual knowledge that the claimant's work was aggravating and worsening her condition. Therefore the respondent had actual notice, and this same evidence, together with the report of Dr. Delgado, supports a finding that the claimant met with personal injury by accident which arose out of and in the course of employment. Although notice was not given within 200 days, it was given within the one year period allowed where the employer fails to timely file an accident report. As the claimant was unable to perform her regular duties, the respondent was under an obligation to file such a report. K.S.A. 44-557(a).[3]

He went on to award TTD and medical benefits, both of which are the subject of this appeal. These issues are not included in the jurisdictional issues listed in K.S.A. 44-534a. And there is no assertion that the ALJ exceeded his jurisdiction in awarding TTD or medical

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[1] K.S.A. 44-510c(b)(2).

[2] *Johnson v. Johnson County*, 36 Kan. App.2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

[3] ALJ Order (Nov. 8, 2007) at 1.

benefits such that the Board would have jurisdiction over these issues at this juncture of the claim.[4] When the record reveals a lack of jurisdiction, this Board Member's authority extends no further than to dismiss the action.[5] Accordingly, respondent's appeal on the issues of temporary total disability and medical are dismissed.

Turning now to the balance of the issues, this Board Member finds the ALJ's preliminary hearing Order should be affirmed.

Claimant has acknowledged that she presented for work on December 11, 2006 with muscle tension which she attributed to an awkward sleeping position. But throughout her workday, she shelved books on all levels of shelves, causing her to reach with her arms and twist her neck, which caused an increase in her pain. She described this as "very sharp" pain, with radiating pain down her right arm.[6] It is undisputed that this increase in pain was observed by her supervisor, Ms. Hedrick. The two discussed this issue and Ms. Hedrick encouraged claimant to seek medical treatment. Ms. Hedrick knew that claimant was leaving work to go see her doctor about her pain complaints.

Claimant left work that day and has never returned as respondent has not accommodated her restrictions. Claimant's personal physician, Dr. Gary Petry took her off work as of December 11, 2006, prescribed pain medicines and recommended she have an MRI and nerve conduction study along with an EMG. She has since been seen by Dr. Sergio Delgado (in November 2007) who concluded that claimant sustained an injury to her neck on December 11, 2006. He further explained that claimant's mechanism of injury "is an aggravation of a pre-existing condition of degenerative changes and cervical spinal stenosis contributing to the radiculopathy. The causation of the injury is related to her work activities and the findings are compatible with the activities that she relates as causing the problem and aggravation of the pre-existing findings."[7] The EMG confirmed a C7-8 radiculopathy.

The difficulty in this case is that claimant did not originally attribute her complaints to work. She admits that her neck symptoms began before she appeared for work on December 11, 2006. And she further concedes that while working that day, she never told her supervisor that her work was *causing* her increased symptoms. But Ms. Hedrick, claimant's supervisor, concedes that she observed claimant while working and that "it was obviously hurting her to try to shelve the books. . ." and that there was something "major

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[4] See K.S.A. 44-551.

[5] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[6] P.H. Trans. at 8.

[7] *Id.*, Cl. Ex. 1 at 4 (Dr. Delgado's Nov. 1, 2007 report).

wrong".[8] It is clear that claimant's pain complaints increased throughout the day as she was doing her work activities. There is no evidence that claimant shelves books as part of her normal activities outside of her job with the school district.

As claimant sought treatment, she denied any acute injury, but rather recited the fact that her complaints increased during work on December 11, 2006. She applied for short term disability benefits, denying any work-related accident. It was late July of 2007 before claimant asserted to respondent that she suffered a work-related accident. Up until that point, respondent alleges it had no notice of a work-related accident occurring on December 11, 2006. Consequently, no accident report had been filed with the state, as required by K.S.A. 44-557.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[9] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[10] The ALJ concluded that claimant's supervisor had actual knowledge that claimant's work was aggravating her condition and this Board Member agrees. It is clear that neither claimant nor Ms. Hedrick understood this aggravation was a compensable event. Nonetheless, the aggravation of her symptoms does constitute an accident that arose out of and in the course of her employment on December 11, 2006, and Ms. Hedrick was aware of the ongoing aggravation.

This Board Member also agrees with the ALJ that respondent had actual knowledge of that fact. Ms. Hedrick and others within the school district (along with claimant herself) failed to understand the legal implications of that aggravation, but that does not negate the liability. Admittedly, claimant's decision to file for short term disability and her denial that her condition was work-related is an inconsistency with her present contention. But claimants are often unaware of the work connection of injuries such as this that do not result from an acute, specific injury but rather from a slow onset over a period of time, even when it involves a preexisting condition or symptom.

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[8] *Id.* at 57.

[9] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[10] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

The respondent did not file any accident report as required by statute.[11] As a result, the time in which claimant is required to serve her written claim is extended beyond the 200 days to 1 year. Here, claimant served her written claim in late July 2007, within the 1 year period set forth in the statute. Thus, the ALJ's conclusion that claimant timely served her written claim is affirmed.

The transcript from the preliminary hearing does not contain any arguments relative to the respondent's present assertion that claimant's activities on December 11, 2006 were tantamount to an activity of daily living and therefore, under *Johnson,*[12] claimant's neck complaints do not constitute a compensable injury. In its brief to the Board, respondent argues:

> In the case at hand, [c]laimant's injury was the result of day-to-day living, not a result of her employment. Claimant is a self-described "old lady" who has seen a chiropractor in the past for neck pain. [cite omitted] The neck twisting that [c]laimant claims she had to do as part of her work for employer was a normal day-to-day activity that [c]laimant would have engaged in at another time, even if not employed by [r]espondent. Claimant has not proven that her alleged injury is work-related, and thus her injury is not compensable.[13]

The Board does not consider arguments that were not presented to the ALJ.[14] And even if that argument were to have been made, this Board Member finds that there is no evidence within the record to support respondent's contention that claimant's activities shelving books at a variety of levels, as she describes, is something that she does outside the workplace. Thus, based upon this record, *Johnson* does not support respondent's argument.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[15] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

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[11] K.S.A. 44-557(a).

[12] *Johnson v. Johnson County*, 36 Kan. App.2d 786.

[13] Respondent's Brief at 5 (filed Dec. 17, 2007).

[14] K.S.A. 44-555c(a); See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

[15] K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated November 8, 2007, is affirmed in part and dismissed in part.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Anton C. Anderson, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge